IN THE

Supreme Court of the United States

October Term, 1951.

No. 83.

ANTONIO RICHARD ROCHIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S BRIEF.

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Opinions Below.

The opinion of the California District Court of Appeal, Second Appellate District, Division III, filed December 12, 1950 [R. 180-184] is reported in 101 Cal. App. 2d 140, and in 225 Pac. 2d 1.

By minute order filed January 11, 1951, and reported in 36 A. C. 552(6), the California Supreme Court, two Justices dissenting, denied a petition for hearing. [R. 184.] The two dissenting opinions from the Order Denying Hearing in the California Supreme Court also filed January 11, 1951, are reported in 101 Cal. App. 2d 143-150 and in 225 Pac. 2d 913. [R. 184-192.]

Jurisdiction.

The Order of the California Supreme Court denying appellant's petition for hearing was filed January 11, 1951. [R. 184.] Petition for a Writ of Certiorari was filed April 9, 1951, in the Supreme Court of the United States, and the Petition for Writ of Certiorari was granted on May 28, 1951. [R. 193.] The Petition for Writ of Certiorari, on page 2 thereof, alleged that jurisdiction of this Court is sought under Section 2101, New Federal Judiciary Code, and by Rule 38½, Rules of the Supreme Court of the United States.

Statement.

Antonio Richard Rochin had been accused by information, and after trial before the Court, sitting without a jury had been found guilty, of the crime of violation of Section 11500 of the California Health and Safety Code, a felony, namely, the unlawful possession of morphine.

The record herein reveals that three Los Angeles County Deputy Sheriffs assigned to the Narcotic Detail had entered a two-story dwelling house in which Antonio Richard Rochin resided, through an open door to the stairway and immediately had gone upstairs. [R. 7-9, 24-25.] The officers had neither forced nor broken open the downstairs door, but they had forced open the door to appellant's upstairs room, which door had a small hook on it. [R. 25.] Inside the room appellant Rochin had been seated on a bed on which a woman named "Hernandez" was

lying. [R. 9.] Also inside the appellant's room, Deputy Sheriff Jones, from about two feet away, had seen two capsules wrapped in clear white cellophane on the night-stand beside the bed. [R. 9, 25, 28, 29.] Officer Jones first had pointed to the capsules and had asked appellant "Whose stuff is this?" [R. 9, 25], whereupon appellant had reached over, grabbed the two capsules and had placed them in his mouth. [R. 9, 25, 29.] The three deputy sheriffs had attempted to get the capsules from his mouth. [R. 9, 29-30.] Some force had been applied to Mr. Rochin's throat, which force the officers believed necessary to eject the capsules from his throat and mouth. [R. 29-30.] On cross-examination, Officer Jones conceded that a struggle had ensued wherein appellant had hollered a bit but had not screamed [R. 30], nor had appellant been knocked or pushed to the floor, stamped on or kicked. [R. 30.] Actually, Rochin had fought back while the officers unsuccessfully tried to remove the capsules. [R. 31.] Specifically, Narcotic Officer Jones [R. 7] testified that before Rochin had hurled them into his mouth, Jones had seen what looked like capsules of heroin, that narcotics usually were wrapped in such fashion, and that Jones inferred such narcotic content from the fact that appellant had placed them in his mouth and had swallowed them. [R. 42.] Immediately after the struggle, Jones had asked appellant where the capsules were, and he had replied that he had thrown them under the bed, but a search disclosed no capsules there. [R. 10.] Later, appellant told the officers that he had thrown the capsules on the sidewalk while he had been taken outside to an automobile. [R. 10.]

From his room, Mr. Rochin immediately had been taken to a hospital where a medical doctor [R. 40] had placed a tube down the appellant's throat and then had poured a liquid solution into the tube and into Mr. Rochin's stomach. [R. 10, 38-39.]. Two capsules still wrapped in cellophane had been expelled into a pail [R. 10-11, 39-40], which capsules upon analysis proved to be morphine, a derivative of opium. [R. 45.]

Moreover, the instant record discloses that when appellant was taken from his room to a police car, the officers told him that they were going to cause his stomach to be pumped by a doctor but he offered no objection. [R. 34-35.] At the hospital, appellant got on the operating table himself and a strap was placed around his middle but appellant said nothing when Officer Jones asked the doctor to pump his stomach. [R. 35.] Appellant had not said that he didn't want a tube to be placed down his throat [R. 35, 37] nor did Jones hear him offer an objection to having his stomach pumped. [R. 38.] Rather, Mr. Rochin had not struggled at all but quietly had lain on the table. [R. 38.]

In a later conversation between the appellant and four sheriff's narcotic officers [R. 14] Rochin stated that he had obtained these two capsules of narcotics on the previous night, that he had been using such narcotics for the past six months, and admitted that he had grabbed the capsules and had put them in his mouth. [R. 15.] Moreover, on the same day on which his stomach had been pumped, Officer Jones had observed a large mark over

a vein on the inside of appellant's upper elbow, which mark was the type mark commonly found on the arm of an addict. [R. 14.]

At his trial, appellant Rochin had taken the stand as a witness but had testified only to his name before being excused. [R. 171.] Significantly, appellant at his trial never described the manner in which he allegedly was manhandled by the officers in his room. Nor was any evidence presented that he had been bruised or marked in any manner. Nor was it stiplated that, if called as a witness, he would testify that he had been assaulted or battered in his room. Further, as to what transpired in the hospital, neither the appellant nor any other percipient witness for the defense gave an account of what had happened there. Rather, without stipulating to the truth of such facts, it was stipulated that if Rochin was called as a witness, he would testify that the two capsules were taken from him by use of the stomach pump without his consent and against his will. [R. 159.]

Summary of Argument.

I.

In California, evidence otherwise competent is not rendered inadmissible by the fact that it might have been obtained by improper or illegal means. Thus evidence obtained by unreasonable search and seizure is admissible in California courts. (*People v. Gonzales* (1942), 20 Cal. 2d 165, 124 Pac. 44; *People v. Mayen* (1922), 188 Cal. 237, 205 Pac. 435; 24 A. L. R. 1383.)

II.

Neither Article I, Section 13 of the California Constitution nor the Fifth Amendment precluded the admission of evidence of the narcotic content of the defendant's stomach. Exemption from complusory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution. (*Adamson v. California* (1947), 332 U. S. 46, 67 S. Ct. 1672, 1675-1976, 91 L. Ed. 1903.) Indeed, the privilege against self-incrimination is limited to testimonial compulsion and does not include forced physical disclosures.

Moreover, the privilege against self-incrimination has no application where, as here, the defendant affirmatively used his body to conceal and destroy evidence which previously had been under the observation of the law enforcement officers. Further, the defendant having taken an opiate by mouth, the washing of his stomach was routine first aid essential to his physical well being.

III.

Although the prohibition against unreasonable search and seizure which is contained in the Fourth Amendment to the United States Constitution extends to state action through the due process clause of the Fourteenth Amendment, due process does not prohibit the admission of illegally obtained evidence in state courts which are not obliged to follow the practice of the Federal Courts in excluding evidence obtained by unreasonable search and seizure. (*Wolf v. Colorado* (1949), 338 U. S. 25, 69 S. Ct. 1359,

93 L. Ed. 1782.) Indeed, the Federal exclusionary rule is but a creature of judicial policy, is followed by a minority of the states, and is contrary to the common law which admitted any relevant evidence. The states which spurn the Federal rule of exclusion and adopt one of admissibility contend that the use of unlawfully obtained evidence in no way affects the fairness of the trial, and that adherence to or rejection of the admissibility rule is a policy question wherein the state legislature must weigh the protection of individual rights against the need to suppress crime for the general public good. Thus, rather than exclude relevant evidence because of its source, such states emphasize other deterrents against unlawful official action, namely in the form of civil suits, criminal prosecutions, executive reprimand, disciplinary action and adverse local public opinion directed against the officials at fault. Moreover, the Federal rule is relaxed to admit in Federal courts evidence illegally obtained by state authorities.

IV.

The instant record is fatally deficient in that it does not reveal whether or not the officers did or did not possess a search warrant, and that, therefore the defendant failed to meet the burden imposed upon him by law, namely, showing affirmatively by the record an unlawful search and seizure. To the contrary, the record herein discloses that the arrest was lawful and the ensuing search and seizure of the contraband was permissible.

ARGUMENT.

I.

In California, Evidence Otherwise Competent Is Not Rendered Inadmissible by the Fact That It Might Have Been Obtained by Improper or Illegal Means. Thus, Evidence Obtained by Unreasonable or Unlawful Search and Seizure Is Admissible in California Courts.

The rule is well settled in California that evidence otherwise competent is not rendered inadmissible because it might have been obtained by improper or illegal means. Consequently, evidence obtained by unreasonable or unlawful search and seizure is admissible in California courts.

In the case of *People v. Gonzales* (1942), 20 Cal. 2d 165, 124 Pac. 2d 44, the defendants Gonzales and Chierotti had been prosecuted for conspiracy to commit grand theft. Police officers, without warrants of any kind, had entered Chierotti's apartment during his absence and had taken therefrom certain evidence of the alleged crime. This evidence was offered at the trial. Before the trial, Chierotti had secured an injunction against the use of the evidence but at the trial the court refused to enforce the injunction and admitted the evidence in question. Thereafter, the California Supreme Court held that evidence obtained in violation of the California Constitution respecting unlawful search and seizure is admissible. On

pages 168-171 of the opinion, the California Supreme Court declared:

"The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches and seizures by federal officers. Pursuant to this mandate the federal courts forbid the introduction in court of evidence obtained by an illegal search or seizure if a timely motion for its exclusion is made by the accused. (Byars v. United States, 273 U. S. 28 (47 S. Ct. 248, 71 L. Ed. 520); Go-Bart Importing Co. v. United States, 283 U. S. 344 (51 S. Ct. 153, 75 L. Ed. 374); Gouled v. United States, 252 U. S. 298, 302 (41 S. Ct. 261, 65 L. Ed. 647); Silverthorne Lumber Co. v. United States, 251 U. S. 385 (40 S. Ct. 182, 64 L. Ed. 319); Boyd v. United States, 116 U. S. 616 (6 S. Ct. 524, 29 L. Ed. 746); Weeks v. United States, 232 U. S. 383 (34 S. Ct. 341, 58 L. Ed. 652); Nardone v. United States, 308 U. S. 338 (60 S. Ct. 266, 84 L. Ed. 307); *Ex parte* Jackson, 96 U. S. 727, 733 (24 L. Ed. 877); Amos v. United States, 252 U. S. 313 (41 S. Ct. 266, 65 L. Ed. 654); Agnello v. United States, 269 U. S. 20 (46 S. Ct. 4, 70 L. Ed. 145).) The California Constitution contains an identical provision (Cal. Const., art. I, sec. 19), but the accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence. (People v. Mayen, 188 Cal. 237 (205 Pac. 435, 24 A. L. R. 1383); *In re* Polizzotto, 188 Cal. 410 (205 Pac. 676); People v. Le Doux, 155 Cal. 535 (102 Pac. 517);

Herrscher v. State Bar, 4 Cal. (2d) 399 (49 P. (2d) 832). See cases cited in 88 A. L. R. 348.) The defendant may have civil and criminal remedies against the officers for their illegal acts (see Pen. Code, sec. 146; Silva v. MacAuley, 135 Cal. App. 249 (26 P. (2d) 887, 27 P. (2d) 791); Ryan v. Crist, 23 Cal. App. 744 (139 Pac. 436); 15 So. Cal. L. Rev. 139, 141 *et seq.*), but the state is not precluded from using the evidence obtained thereby.

"The Fourth Amendment to the Constitution of the United States is not a limitation upon the states (National Safety Deposit Co. v. Stead, 232 U. S. 58 (34 S. Ct. 209, 58 L. Ed. 504); Ohio v. Dollison, 194 U. S. 445 (24 S. Ct. 703, 48 L. Ed. 1062)), and California is free to interpret its own Constitution. Defendants contend, however, that the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law. Not all of the first ten amendments to the federal Constitution, however, fall within the concept of due process of law. (Palko v. Connecticut, 302 U. S. 319 (58 S. Ct. 149, 82 L. Ed. 288); Twining v. New Jersey, 211 U. S. 78 (29 S. Ct. 14, 53 L. Ed. 97); Snyder v. Massachusetts, 291 U. S. 97 (54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575). See 39 Harv. L. Rev. 431; 24 Harv. L. Rev. 366.) In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be

distinguished from the introduction in court of the evidence obtained as a result thereof. 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures' may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. . . . The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (People v. Defore, 242 N. Y. 13 (150 N. E. 585); People v. Mayen, *supra;* Com. v. Donnelly, 246 Mass. 507 (141 N. E. 500); Johnson v. State, 152 Ga. 271 (109 S. E. 662, 19 A. L. R. 641).) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (8 Wigmore, Evidence (3rd ed.), sec. 2183, p. 5, and cases there cited.)"

Stated otherwise, the California courts consistently have held that the Fourth Amendment to the Constitution of the United States, relating to searches and seizures, only applies to the Federal Government and its agencies, and that evidence obtained in violation of Section 19 of Article I of the California Constitution prohibiting unreasonable searches and seizures is admissible in California courts for where competent evidence is pro-

duced on a trial the courts will not stop to inquire or investigate the source from whence it comes or the means by which it was obtained.

People v. Mayen (1922), 188 Cal. 237, 240-251, 205 Pac. 435, 24 A. L. R. 1383, and cases therein cited.[1]

Moreover, such evidence illegally obtained is admissible in California courts whether taken from the defendant's premises (*In re Polizzotto* (1922), 188 Cal. 410, 411, 205 Pac. 676; *People v. Oreck* (1946), 74 Cal. App. 2d 215, 217-218, 168 Pac. 2d 186; *People v. Richardson* (1927), 83 Cal. App. 302, 305, 256 Pac. 616, *supra*) or from his person. (*People v. Wren* (1922), 59 Cal. App. 116, 117, 210 Pac. 60; *People v. Martin* (1924), 70 Cal. App. 271, 273, 233 Pac. 85.)

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[1]In accord: *People v. Kelley* (1943), 22 Cal. 2d 169, 172-173, 137 Pac. 2d 1; *Herrscher v. State Bar* (1935), 4 Cal. 2d 399, 412, 49 Pac. 2d 832; *In re Polizzotto* (1922), 188 Cal. 410, 411, 205 Pac. 676; *People v. Le Doux* (1909), 155 Cal. 535, 547, 102 Pac. 535; *People v. Raffington* (1950), 98 Cal. App. 2d 455, 457, 220 Pac. 2d 967, 969-970, hearing by California Supreme Court denied August 10, 1950, certiorari denied by U. S. S. Ct., 340 U. S. 912, 71 S. Ct. 292, 95 L. Ed. (Adv. Ops.) 203; *People v. Richardson* (1927), 83 Cal. App. 302, 305, 256 Pac. 616, hearing by California Supreme Court denied July 21, 1927, certiorari denied by U. S. S. Ct., 276 U. S. 615, 48 S. Ct. 208, 72 L. Ed. 732; *People v. Jackson* (1947), 80 Cal. App. 2d 386, 391, 181 Pac. 2d 741; *People v. Chait* (1945), 69 Cal. App. 2d 503, 552, 159 Pac. 2d 445; *People v. Peak* (1944), 66 Cal. App. 2d 894, 904-905, 153 Pac. 2d 464; *People v. Beilfuss* (1943), 59 Cal. App. 2d 83, 87-88, 138 Pac. 2d 332; *People v. Wong Toy* (1933), 131 Cal. App. 455, 456, 21 Pac. 2d 465; *People v. Guido* (1928), 93 Cal. App. 478, 479, 269 Pac. 670; *People v. Eiseman* (1926), 78 Cal. App. 223, 245, 248 Pac. 716; *In re Ajuria* (1922), 57 Cal. App. 667, 669, 207 Pac. 515; *People v. Warren* (1910), 12 Cal. App. 730, 732, 108 Pac. 725; *People v. Swaile* (1909), 12 Cal. App. 192, 196, 107 Pac. 134.

Indeed, the approach of appellant herein is similar to that urged in *People v. Harmon* (1948), 89 Cal. App. 2d 55, 58, 200 Pac. 32, where the court said:

> "The contention that the evidence was obtained in violation of the Fourth Amendment of the Constitution of the United States is not well founded. The California rule is that the illegality of search and seizure does not affect the admissibility of the evidence—there is no denial of due process of law because the previous illegal acts do not affect the fairness and impartiality of the trial itself, and the defendant may have civil and criminal remedies against the officers for said illegal acts. (People v. Mayen, 188 Cal. 237 (205 P. 435, 24 A. L. R. 1383); People v. Gonzales, 20 Cal. 2d 165 (124 P. 2d 44); People v. One 1941 Mercury Sedan, 74 Cal. App. 2d 199, 202 (168 P. 2d 443).) Defendant admits that the rule stated in People v. Gonzales, *supra*, is the controlling rule in this state, but raises the question in the hope that prior decisions will be disapproved. It must be held that the evidence was factually and legally sufficient to uphold the verdict."

That the California Legislature is in accord with and as yet has not chosen to change the California rule that evidence even improperly or illegally obtained is admissible in California courts, is demonstrated by its failure to adopt a proposed Senate Bill No. 1689 introduced January 23, 1951 and reading as follows:

> "An act to add Section 1873 to the Code of Civil Procedure, relating to evidence.
>
> The people of the State of California do enact as follows:

SECTION 1. Section 1873 is added to the Code of Civil Procedure, to read:

1873. No evidence obtained in violation of Section 19, of Article I of the Constitution or any law of this State shall ever be introduced or admitted or used for any purpose whatsoever in any court of this State."

(See: Final Calendar of Legislative Business, Regular Session 1951, California Legislature, p. 444.)

II.

Neither Article I, Section 13, of the California Constitution nor the Fifth Amendment Precluded the Admission of Evidence of the Narcotic Content of Petitioner's Stomach.

A. The Privilege Against Self-incrimination Is Limited to Testimonial Compulsion and Does Not Include Forced Physical Disclosures.

Petitioner urges that the forced pumping of his stomach constituted an invasion of his privilege against self-incrimination in violation of Article I, Section 13, of the California Constitution and the Fifth Amendment to the Federal Constitution.

Article I, Section 13, of the California Constitution provides in part:

". . . No person shall . . . be compelled in any criminal case, to be witness against himself; . . ."

However, the privilege against self-incrimination extends only to testimonial evidence but does not include forced physical disclosures.

Wigmore generally is cited as being one of the foremost proponents of limiting the privilege against self-incrimination to testimonial compulsion. Thus, in an early revised edition of Greenleaf, he said:

> "The scope of the privilege . . . includes only the process of testifying, by word of mouth or in writing; . . . It has no application to such physical, evidential circumstances as may exist on the witness' body or about his person."
>
> Greenleaf, Evidence (Wigmore's 16th Ed. 1899), 615, Sec. 469e.

Again, in Wigmore's own work (Wigmore, Evidence (3rd ed. 1940), p. 363, Sec. 2263), it is said:

> ". . . it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion."

In accord:

> American Law Institute, Model Code of Evidence, Rules 201 and 205.

Similarly, in the case of *Holt v. United States* (1910), 218 U. S. 245, 252-253, 31 S. Ct. 2, 6, 54 L. Ed. 1021, 20 Ann. Cas. 1138, the United States Supreme Court in holding that the privilege against self-incrimination is limited to communications or testimonial compulsion, stated:

> "Another objection is based upon an extravagant extension of the 5th Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible,

and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof. Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372."

See also: *Twining v. New Jersey* (1908), 211 U. S. 78, 91, 29 S. Ct. 14, 53 L. Ed. 97, discussing the exemption from compulsory self-incrimination as an exemption from testimonial compulsion.

In *United States v. Ong Sui Hong* (1917), 36 Phil. Is. 735, 735-736, where the accused had been forced to discharge morphine from his mouth, the court in holding that the privilege against self-incrimination was limited to testimonial compulsion, said:

". . . To force a prohibited drug from the person of an accused is along the same line as requiring him to exhibit himself before the court; or putting in evidence papers and other articles taken from the room of an accused in his absence; or, as in the Tan Teng case, taking a substance from the body of the accused to be used in proving his guilt. . . ."

Again, in *United States v. Tan Teng* (1912), 23 Phil. Is. 145 where in a rape prosecution the result of a scientific

examination of a substance taken from the accused's body, showing that accused was suffering from gonorrhea, was admitted over the objection that it violated the privilege against self-incrimination. The court on page 152 of its opinion, cited approvingly from *Holt v. United States*, 218 U. S. 245, 31 S. Ct. 2, and then set forth the following quotation:

> "Mr. Wigmore, in his valuable work on evidence, in discussing the question before us, said:
>
> "'If in other words, it (the rule) created inviolability not only for his [physical control of his] own vocal utterances, but also for his physical control in whatever form exercised, then it would be possible for a guilty person to shut himself up in his house, with all the tools and indicia of his crime, and defy the authority of the law to employ in evidence anything that might be obtained by forcibly overthrowing his possession and compelling the surrender of the evidential articles—a clear *reductio ad absurdum*. *In other words, it is not merely compulsion* that is the kernel of the privilege, ... but *testimonial compulsion*.' (4 Wigmore, sec. 2263.)"

Also holding that the prohibition against compelling a person in a criminal proceeding to be a witness against himself, is a prohibition against the use of physical or moral compulsion to extort *communications* from him, but is not an exclusion of his body as evidence when it may be material, are the following cases:

State v. McLaughlin (1916), 138 La. 958, 70 So. 925, 928, and

Coleman v. State (1948), 151 Tex. Cr. R. 582, 209 S. W. 2d 925, 927, involving scrapings taken from under fingernails of accused's hands;

Bratcher v. United States, 149 Fed. 2d 742, 745 (C. C. A. 4th Va. 1945), certiorari denied 325 U. S. 885, 65 S. Ct. 1580, 89 L. Ed. 2000, where defendant had been convicted of violation of Selective Service Act, it was held that a physical examination resulting in discovery that he had taken a drug to cause abnormal physical condition was not an "unlawful search and seizure" nor did the use of such evidence constitute compulsory self-incrimination;

McFarland v. United States, 150 Fed. 2d 593 (U. S. C. A. D. C. 1945), 80 U. S. App. D. C. 196, rehearing denied 326 U. S. 788, 66 S. Ct. 472, 90 L. Ed. 478; 327 U. S. 814, 66 S. Ct. 526, 90 L. Ed. 1038, pointing out that "Out of court as well as in court his body may be examined with or without his consent";

Swingle v. United States, 151 Fed. 2d 512 (C. C. A. 10th, Utah, 1945);

Ash v. State (1940), 139 Tex. Crim. Rep. 420, 141 S. W. 2d 341.

Factually, very similar to the instant case is the case of *People v. One 1941 Mercury Sedan* (1946), 74 Cal. App. 2d 199, 168 Pac. 2d 443, a proceeding for forfeiture of an automobile used for transportation of marihuana wherein it appeared that the driver of the vehicle on his apprehension had swallowed some brown paper which he had in his hands, in which case the appellate court reversed the lower court and allowed the introduction of the evidence which had been obtained by forcibly pumping the stomach of the driver. Early in its opinion, the Dis-

trict Court of Appeal in 74 Cal. App. 2d 199 at page 202, observed:

> ". . . Such offense likewise is a criminal offense insofar as the persons in the car who are transporting narcotics are concerned. This being so, for the purposes of this appeal, and without now deciding the question, it may be assumed that the same rules apply, so far as the admissibility of the rejected evidence is concerned, as would apply were this a criminal charge against Williams."

Thereafter, the court, on pages 202-203 of said opinion, reiterated the rule, that even assuming the proffered evidence had been securd illegally, such illegally-obtained evidence is admissible if competent. In addition, that court held that evidence as to the narcotic content of the substances pumped from the driver's stomach was not privileged under the California Constitution, Article I, Section 13, and should have been admitted, since such evidence did not depend on the testimonial utterances of the driver for its probative force; that the privilege against self-incrimination does not preclude the introduction of physical disclosures a defendant is forced to make or the results of tests to which he has involuntarily submitted; that the privilege only protects the individual from any forced disclosures made by him whether oral or written; and that it is limited to the protection against testimonial compulsion. Specifically, the appellate court stated:

> "In line with the weight of authority it is our opinion that the privilege against self-incrimination does not preclude the introduction of physical disclosures the defendant is forced to make, or the results of tests to which he has involuntarily submitted. It is our view that the privilege only protects the in-

dividual from any forced disclosures made by him, whether oral or written. It is limited to the protection against testimonial compulsion. The privilege protects the accused from the process of extracting from his own lips against his will an admission of guilt, but it does not extend to the exclusion of his body as evidence when such evidence may be relevant and material. The privilege is aimed at preventing the compulsory oral examination of the accused before or during trial. Experience of many years has demonstrated that when statements are extorted from an accused there is a strong likelihood that the extorted evidence would be unreliable. But the reason for the rule no longer exists when physical evidence is considered. . . ."

People v. One 1941 Mercury Sedan (1946), 74 Cal. App. 2d 199, 212-213, 168 Pac. 2d 443, 451, petition for hearing denied by Supreme Court, June 27, 1946, Carter, J., and Schauer, J., voting for hearing.

For a comprehensive discussion of the subject of the admissibility of evidence of forced physical disclosures as non-violative of the privilege against self-incrimination, see *People v. One 1941 Mercury Sedan, supra* (74 Cal. App. 2d), at pages 202-213, inclusive, and cases cited therein.

Incidentally, the case of *People v. One 1941 Mercury Sedan, supra,* approved the California cases of *People v. Guiterez* (1932), 126 Cal. App. 526, 14 Pac. 2d 838, and *People v. Salas* (1936), 17 Cal. App. 2d 75, 61 Pac. 2d 771, where the courts held that the results of physical examinations to which the defendants voluntarily submitted are admissible. However, the court in the *Mer-*

cury Sedan case, specifically pointed out that those cases did not pass upon, nor did they involve, the question as to whether the results of an involuntary physical examination are admissible. In *People v. Salas, supra,* the defendant had not objected to an examination of his forearm and it was held that a properly qualified person could testify that the arm showed scars as though made by a hypodermic syringe.

See, also: *People v. Gin Hauk Jue* (1949), 93 Cal. App. 2d 72, 74, 208 Pac. 2d 717, holding that evidence of hypodermic needle marks on defendant's arm was admissible in a charge of illegal possession of opium in violation of Section 11500 of the Health and Safety Code and citing *People v. Casas,* 77 Cal. App. 2d 255, 175 Pac. 2d 19.

A recent case involving the admissibility in evidence of forced physical disclosures and citing with approval *People v. One 1941 Mercury Sedan, supra* (74 Cal. App. 2d 199, 168 Pac. 2d 443), is the case of *People v. Tucker* (1948), 88 Cal. App. 2d 333, 344, 198 Pac. 2d 941. In the *Tucker* case, the defendant had been convicted of violation of Section 501 of the California Vehicle Code in that he had driven a car under the influence of intoxicating liquor, resulting in a collision with another vehicle and causing bodily injury to specified persons. On appeal to the District Court of Appeal, Tucker urged that evidence of the alcoholic content of his blood specimen had been taken while he was in a semi-conscious condition and without his consent in violation of Article I, Section 13, of the California Constitution; Sections 688 and 1323 of the California Penal Code, and the Fifth Amendment to the Federal Constitution. However, the Appellate Court rejected

Tucker's contentions and affirmed his conviction declaring that the rule against self-incrimination extends to testimonial evidence only, and not to those cases where the defendant has been compelled to submit to physical examination and tests which are later presented as evidence against him. (In *People v. Tucker, supra*, Petition for Rehearing denied November 19, 1948, and Petition for Hearing denied by California Supreme Court December 2, 1948.)

B. The Privilege Against Self-incrimination Did Not Empower the Petitioner to Use His Body to Conceal or Secrete Evidence Already Under the Observation of the Law Enforcement Officers.

In the case at bar the evidence is clear that the arresting officers first saw the two capsules in question on a night-stand beside the bed in petitioner's room. [R. 9.] After Deputy Sheriff Jones had pointed to the capsules from approximately two feet away [R. 9, 28] and had asked Rochin about them, petitioner had grabbed the capsules and had placed them in his mouth. [R. 9, 28-29.] Hence, the pumping of petitioner's stomach was necessitated by his own attempt to destroy evidence or use his body to conceal evidence. Nevertheless, petitioner strenuously insists that so long as he physically was able to get the capsules into his digestive tract he can use his body as a shield to preclude the law enforcement officers from obtaining evidence which they previously had seen and would have taken into custody but for his affirmative act of swallowing the capsules.

Indeed, the instant case is quite analogous to *Ash v. State* (1940), 139 Tex. Crim. Rep. 420, 141 S. W. 2d 341, 343, where the accused who had been charged with receiving stolen property, swallowed several of the stolen rings. Against his will and over his objection he was given an enema and the stolen property thus recovered later was produced in evidence at his trial. Following his conviction he appealed, alleging that the privilege against self-incrimination had been violated. On page 343 (141 S. W. 2d 341) the court stressed the fact that after the appellant had come under the officers' observation he had placed the objects in his mouth. Thereafter, the court observed:

> ". . . The evidence is replete with the conduct of the appellant in fighting the officers physically resisting every effort made by them to procure the rings, but there is no evidence to indicate any cruelty or unusual treatment on their part in doing so. They gave him an enema, a very normal and natural thing to do, thereby extracting the rings which the appellant had chosen to secrete in this most unusual manner. If the act of the officers should be considered unusual, it was brought about by reason of the act of the accused party."

See, also:

People v. One 1941 Mercury Sedan, 74 Cal. App. 2d 199, 211-212, 168 Pac. 2d 443, Petition for Hearing in Supreme Court denied June 27, 1946, two Justices voting for a hearing, citing with approval *Ash v. State, supra* (139 Tex. Crim. Rep. 420, 141 S. W. 2d 341, 343).

C. The Evidence Herein Justifies the Conclusion That There Was No Objection to the Stomach Pumping Which Failure to Object Constitutes a Waiver of Any Privilege Against Self-incrimination.

Although petitioner never testified relative to the pumping of his stomach, it was stipulated without conceding the truth thereof, that if he was called as a witness petitioner would testify that the two capsules were taken from him by use of the stomach pump without his consent and against his will. [R. 159.] On the other hand, the instant record discloses that Deputy Sheriff Jones testified that when the officers put petitioner in the car they told him that they were going to cause his stomach to be pumped by a doctor but petitioner offered no objection. [R. 34-35.] At the hospital, petitioner got on the operating table himself and when Jones asked the doctor to pump his stomach Rochin said nothing. [R. 34-35.] Petitioner did not state that he didn't want a tube placed down his throat [R. 35] nor did Jones hear petitioner offer an objection to having his stomach pumped. [R. 38.] Rather, Rochin quietly had lain on the table. [R. 38.]

It is respondent's contention that the foregoing testimony by the arresting officer fully supported the conclusion that there was no objection by petitioner to his stomach pumping, and therefore, a voluntary submission to a physical examination by petitioner.

See: *People v. Bundy* (1914), 168 Cal. 777, 781-782, 145 Pac. 537, where a failure to object was regarded as a voluntary submission, and a waiver of any privilege against self-incrimination.

Certainly, it is not inconceivable that petitioner, upon reflection following his hurried action in getting the capsules down his throat, realized that his health demanded

that the two capsules of narcotic be removed from his stomach.

Indeed, it appears that the use of a stomach pump is regarded as routine first aid treatment when opium derivatives are taken by mouth.

Thus, in Thienes & Haley, "Clinical Toxicology," 2nd Edition, Lea & Febiger, Phila., 1948, p. 85, discussing treatment of opium and opium derivatives, it is said:

> ". . . If the drug is taken by mouth, the stomach should be washed out; 1/10 gram of potassium permanganate diluted with a glass or two of warm water may be used for this purpose. (See Chapter XXV for further details.) . . ."

Again, discussing Treatment of Acute Morphine and Opium Poisoning, it has been said:

> "If the opiate was taken by mouth, the first indication is to *empty the stomach.* If narcosis has already set in, emetics may act too slowly and the stomach tube should be used."
>
> Torald Sollman, A Manual of Pharmacology, Philadelphia, Saunders Co. (1942), p. 286.

Similarly, Cole & Puestow, First Aid Surgical and Medical, 4th Edition, Copyright 1951 Appelton-Century-Crofts, Inc., N. Y., p. 342, recites:

> "Morphine, laudanum, paregoric, heroin, codeine, pantopon and dilaudid are all opium derivatives. The triad of coma, pinpoint pupils, and the depressed slow breathing are characteristic of poisoning. If the patient is seen early before coma is deep, mustard in water may be tried as an emetic. Usually it is unsuccessful. A stomach tube should be used to empty the stomach as soon as possible. Wash with a 1:1000 solution of potassium permanganate. Some advocate leaving a small amount of this solution in the stomach."

III.

In a Prosecution in a State Court for a State Offense the Due Process Clause of the Fourteenth Amendment Does Not Require the Exclusion of Evidence Obtained by State Officers by Unreasonable Search and Seizure. Nor Is the Exemption From Compulsory Self-incrimination in State Courts Secured by the Federal Constitution.

A. In a Prosecution in a State Court for a State Offense the Due Process Clause of the Fourteenth Amendment Does Not Require the Exclusion of Evidence Obtained by Unreasonable Search and Seizure.

It long has been the law that the first eight amendments to the Constitution of the United States, known as the Bill of Rights, are not binding upon the states but only are restrictions upon the Federal Government.

Barron v. Baltimore (1833), 7 Peters 242, 249-250, 8 L. Ed. 672;

Spies v. Illinois (1887), 123 U. S. 131, 166, 8 S. Ct. 21, 22, 31 L. Ed. 80;

Brown v. New Jersey (1899), 175 U. S. 172, 174, 20 S. Ct. 77, 44 L. Ed. 119;

Twining v. New Jersey (1908), 211 U. S. 78, 93, 98, 29 S. Ct. 14, 17, 53 L. Ed. 97;

Ohio ex rel. Lloyd v. Dollison (1904), 194 U. S. 445, 447, 24 S. Ct. 703, 704, 48 L. Ed. 1062;

Feldman v. United States (1944), 322 U. S. 487, 490, 64 S. Ct. 1082, 1083, 88 L. Ed. 1408, 154 A. L. R. 982;

Adamson v. California (1947), 332 U. S. 46, 67 S. Ct. 1672, 1675, 91 L. Ed. 1903;

Wolf v. Colorado (1949), 338 U. S. 25, 69 S. Ct. 1359, 1360, 93 L. Ed. 1782;

United States v. Ragen, 181 Fed. 2d 1001, 1003 (C. C. A. 7th, 1950).

Further, it has been held that the Fourth Amendment to the Constitution of the United States is not a limitation upon the states.

Weeks v. United States (1913), 232 U. S. 383, 398, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B 834, Ann. Cas. 1915C, 1177;

National Safe Deposit Co. v. Stead (1914), 232 U. S. 58, 71, 34 S. Ct. 209, 213, 58 L. Ed. 504;

Feldman v. United States (1944), 322 U. S. 487, 64 S. Ct. 1082, 1083, 88 L. Ed. 1048, 154 L. Ed. 982;

In re Guzzardi, 84 Fed. Supp. 294, 295 (U. S. D. C., N. D. Tex., 1949);

United States v. Smith, 23 Fed. Supp. 528, 529 (D. C., E. D. Mo., 1938), and cases cited therein.

Nor has the Fifth Amendment to the Federal Constitution been held to be a limitation upon the states.

Barr n v. Baltimore (1833), 7 Peters 242, 250, 8 L. Ed. 672;

Maxwell v. Dow (1899), 176 U. S. 581, 584-585, 20 S. Ct. 448, 44 L. Ed. 597;

Barrington v. Missouri (1906), 205 U. S. 483, 486, 27 S. Ct. 582, 51 L. Ed. 890;

Twining v. New Jersey (1908), 211 U. S. 78, 88, 29 S. Ct. 15, 53 L. Ed. 97;

Palko v. Connecticut (1937), 302 U. S. 319, 58 S. Ct. 149, 150, 82 L. Ed. 288;

Feldman v. United States (1944), 322 U. S. 487, 64 S. Ct. 1082, 1083, 88 L. Ed. 1408, 154 L. Ed. 982;

United States v. Ragen, 181 Fed. 2d 1001, 1003 (C. C. A. 7th, 1950).

Moreover, it has been held that the adoption of the Fourteenth Amendment did not incorporate and make operative in state courts the entire Bill of Rights of the first eight amendments to the United States Constitution on the ground that the rights protected by those amendments are, by virtue of the Fourteenth Amendment, to be regarded as privileges and immunities of citizens of the United States, nor does the due process clause of the Fourteenth Amendment draw all of the Federal Bill of Rights under its protection.

Maxwell v. Dow (1899), 176 U. S. 581, 20 S. Ct. 448, 455, 44 L. Ed. 597;

Twining v. New Jersey (1908), 211 U. S. 78, 29 S. Ct. 14, 19-20, 53 L. Ed. 97;

Palko v. Connecticut (1937), 302 U. S. 319, 58 S. Ct. 149, 151-152, 82 L. Ed. 288.

Thus, in the recent case of *Wolf v. Colorado* (1949), 338 U. S. 25, 93 L. Ed. 1782, 69 S. Ct. 1359, at page 1360, the Supreme Court of the United States declared:

"Unlike the specific requirements and restrictions placed by the Bill of Rights, Amendments I to VIII, upon the administration of criminal justice by federal authority, the Fourteenth Amendment did not subject criminal justice in the States to specific limitations. The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and there-

by incorporates them has been rejected by this Court again and again, after impressive consideration. See, *e. g.*: Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 292, 28 L. Ed. 232; Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97; Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; Palko v. Connecticut, 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. Only the other day the Court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the Fourteenth Amendment. Adamson v. California, 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223. The issue is closed."

In *Wolf v. Colorado* (1949), 338 U. S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782, the court posed and then answered in negative the following query:

"Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment, solely because evidence that was admitted at the trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment. . . .?"

After declaring that the adoption of the Fourteenth Amendment did not incorporate the first eight amendments of the United States Constitution, the court did conclude that the "due process clause" of the Fourteenth Amendment did exact from the states all that is "implicit in the concept of ordered liberty" and that the security of the individual's privacy against arbitrary intrusion by the police which is at the core of the Fourth Amendment was implicit in the concept of ordered liberty and as such ena-

forceable against the states through the due process clause. Stating that the Federal exclusionary rule barring the use of evidence obtained through an illegal search and seizure had been derived solely by judicial implication, the United States Supreme Court thereafter held that in a prosecution for a state crime in a state court the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure. In the concurring opinion, Mr. Justice Black stated his belief that the Fourteenth Amendment was intended to make the Fourth Amendment in its entirety applicable to the states, but concluded that the Fourth Amendment did not of itself bar the use of evidence unlawfully obtained by unreasonable search and seizure, and that the Federal exclusionary rule is not a command of the Fourth Amendment but a judicially created rule of evidence which Congress might negate.

Stated otherwise, *Wolf v. Colorado, supra,* held that the prohibition against unreasonable search and seizure which is contained in the Fourth Amendment extends to state action through the due process clause of the Fourteenth Amendment but that due process does not prohibit the admission of illegally obtained evidence in state courts, so that state courts are not bound to follow the practice of the Federal Courts in excluding evidence obtained by unreasonable search and seizure.[2]

Following the holding of *Wolf v. Colorado, supra,* that the due process clause of the Fourteenth Amendment does not require the rule of exclusion in criminal proceedings in state courts, and admitting illegally obtained evidence, are:

Commonwealth v. Greco (1950), 166 Pa. Super. 133, 70 Atl. 2d 413, 414;

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[2]See: 24 Tulane L. R. 410; 25 St. Johns L. R. 86-89.

State v. Mara (1951, Sup. Ct. N. H.), 78 Atl. 2d 922, 924;

Lambert v. State (1950, Ct. App. Md.), 75 Atl. 2d 327, 329;

People v. Vieni (1950), 301 N. Y. 535, 93 N. E. 2d 345;

Winston v. State (1949), 79 Ga. App. 711, 54 S. E. 2d 354, 355;

Huff v. State (1950), 82 Ga. App. 545, 61 S. E. 2d 787, 790.

B. Exemption From Compulsory Self-incrimination in the Courts of the States Is Not Secured by Any Part of the Federal Constitution.

An exemption from compulsory self-incrimination is not a privilege or imunity of national citizenship guaranteed by the privileges and immunities clause of the Fourteenth Amendment against abridgement by the states, nor an element of due process of law within the meaning of the Fourteenth Amendment.

Twining v. New Jersey (1908), 211 U. S. 78, 99, 105-106, 29 S. Ct. 14, 53 L. Ed. 97.

Indeed, it is settled law that the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights. Moreover, the privilege against self-incrimination is not part of the right to a fair tria

protected by the due process clause of the Fourteenth Amendment to the Federal Constitution.

Adamson v. California (1947), 332 U. S. 46, 67 S. Ct. 1672, 1675-1677, 91 L. Ed. 1903, and cases cited therein;

Twining v. New Jersey (1908), 211 U. S. 78, 91-98, 29 S. Ct. 14, 16-19, 53 L. Ed. 97.

Further, the United States Supreme Court has said:

". . . The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. . . ."

Palko v. Connecticut (1937), 302 U. S. 319, 58 S. Ct. 149, 151, 82 L. Ed. 288;

Snyder v. Massachusetts (1934), 291 U. S. 97, 54 S. Ct. 330, 332, 78 L. Ed. 674, 90 A. L. R. 575;

Brown v. Mississippi (1936), 297 U. S. 278, 56 S. Ct. 461, 464, 80 L. Ed. 682.

However, it is true that the United States Supreme Court has held that the due process clause of the Fourteenth Amendment includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the amendment forbids the use of a confession obtained by coercion or torture, but this on the ground that a confession obtained by coercion and torture is so unreliable that its use violates all concepts of fairness and justice.

Chambers v. Florida (1940), 309 U. S. 227, 60 S. Ct. 472, 477-478, 84 L. Ed. 682;

Brown v. Mississippi (1936), 297 U. S. 278, 56 S. Ct. 461, 465, 80 L. Ed. 682;

Lisenba v. California (1941), 314 U. S. 219, 62 S. Ct. 280, 290, 86 L. Ed. 166, rehearing denied 315 U. S. 826, 62 S. Ct. 620, 86 L. Ed. 1222 (1942).

C. The Basis for the Admissibility Rule in Those States Which Reject the Federal Rule of Exclusion.

1. THE COMMON LAW RULE IS ONE OF ADMISSIBILITY.

At common law, relevant evidence was admissible though illegally obtained on the theory that the admissibility of the evidence is not affected by the illegality of the means by which it was obtained.

Wigmore, Evidence (Third Ed. 1940), Secs. 2183, 2184;

Commonwealth v. Tibbetts (1893), 157 Mass. 519, 32 N. E. 910;

People v. Defore (1926), 242 N. Y. 13, 150 N. E. 585, 589, certiorari denied sub. nom. *Defore v. New York* (1926), 270 U. S. 657;

Rickards v. State (Del. 1950), 77 Atl. 2d 199, 204, 205.

See, also:

Wolf v. Colorado (1949), 338 U. S. 25, 69 S. Ct. 1359, 1362, 93 L. Ed. 1782, declaring that of ten jurisdictions within the United Kingdom and the British Commonwealth of Nations, which have passed on the question, none has held evidence obtained by illegal search and seizure inadmissible.

Generally, the common law rule of admissibility is supported on the ground that the remedy for the invasion of one's privacy is entirely independent of the question of guilt in a criminal prosecution to which the seized evidence is pertinent. Stated otherwise, the search or seizure is a collateral matter which has no logical connection with the determination of the guilt or innocence of the accused.

8 Wigmore, Evidence (Third Ed. 1940), Sec. 2183;

People v. Mayen (1922), 188 Cal. 237, 242, 252, 205 Pac. 435, 24 A. L. R. 1383;

Commonwealth v. Wilkins (1923), 243 Mass. 356, 362, 138 N. E. 11, 14;

Meisinger v. State (1928), 155 Md. 195, 199, 141 Atl. 536, 537;

State v. Tonn (1923), 195 Iowa 94, 191 N. W. 530, 535.

2. THE USE OF UNLAWFULLY OBTAINED EVIDENCE DOES NOT AFFECT THE FAIRNESS OF THE TRIAL.

The use of evidence obtained through an illegal search and seizure, does not violate due process of law, for it does not affect the fairness or impartiality of the trial. The fact that an officer acted improperly in obtaining evidence presented at the trial, in no way precludes the court from affording a fair hearing and rendering a fair and impartial judgment.

People v. Gonzales (1942), 20 Cal. 2d 165, 171, 124 Pac. 2d 44;

People v. Defore (1926), 242 N. Y. 13, 150 N. E. 585;

Commonwealth v. Donnelly (1923), 246 Mass. 507, 141 N. E. 500-501;

Johnson v. State (1921), 152 Ga. 271, 109 S. E. 662, 663, 19 A. L. R. 641.

As stated in *United States v. Ragen*, 181 Fed. 2d 1001, 1005 (C. C. A. 7th 1950):

"Chief Justice Stone said in Malinski v. People of State of New York, 324 U. S. 401, 438, 65 S. Ct. 781, 799, 89 L. Ed. 1029: '* * * And however reprehensible or even criminal the acts of state officials may be, in so far as the conduct of the trial

is concerned, they do not infringe due process unless they result in the use against the accused of evidence which is coerced or known to the State to be fraudulent or perjured, or unless they otherwise deny to him the substance of a fair trial, which is due process. * * *"

3. ADHERENCE TO THE ADMISSIBILITY RULE IS A MATTER OF STATE POLICY BASED ON STATE EXPERIENCE.

Moreover, it is felt that the adherence to or rejection of the admissibility rule is a policy question which ought to be left to the people and the state legislature.

People v. Defore (1926), 242 N. Y. 13, 150 N. E. 585, 588-589;

State v. Mara (1951 Sup. Ct. N. H.), 78 Atl. 2d 922, 925;

State v. Johnson (1948), 116 Kan. 58, 65, 226 Pac. 245, 249;

People v. La Combe (1939), 170 Misc. 669, 9 N. Y. Supp. 2d 877, 878;

People v. Mayen (1922), 188 Cal. 237, 253, 205 Pac. 435, 441;

State v. Fleckinger (1922), 152 La. 337, 341, 93 So. 115, 116.

Hence, the United States Supreme Court in *Wolf v. Colorado* (1949), 338 U. S. 25, 69 S. Ct. 1359, 1363, 93 L. Ed. 1782, recognized that it was a matter of state policy based on state experience to weigh the right to be secure from unreasonable searches and seizures against the public policy of suppressing crime, so that the state may deem the individual right to be subordinate to that public policy. Thereafter, in a footnote (69 S. Ct. 1359, 1363) the court referred to the language of Mr. Justice

Cardozo in *People v. Defore* (1926), 242 N. Y. 13, 150 N. E. 585, 589, which language was in part as follows:

> ". . . The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the Adams Case strikes a balance between opposing interests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the courts that the change has come to pass."

As stated in *Twining v. New Jersey* (1908), 211 U. S. 78, 114, 29 S. Ct. 14, 53 L. Ed. 97, if the people of the state are not content with the law as declared in repeated decisions of the state courts, their remedy is by legislation.

4. Civil Suit, Criminal Prosecution, Executive Reprimand and Disciplinary Action as Deterrents.

The states which follow the doctrine of admissibility consider the possibilities of a civil suit, criminal prosecution, executive reprimand, and disciplinary action, a sufficient deterrent to the abuse of official authority.

Wolf v. Colorado (1949), 338 U. S. 25, 69 S. Ct. 1359, 1362, 93 L. Ed. 1782;

People v. Defore (1926), 242 N. Y. 13, 150 N. E. 585, 586-587;

People v. Gonzales (1942), 20 Cal. 2d 165, 169, 124 Pac. 2d 44;

State v. Mara (1951 Sup. Ct. N. H.), 78 Atl. 2d 922, 925.

In California, the courts allow a civil action to recover evidence illegally obtained even though a criminal court is making current use of it.

Stern v. Superior Court (1946), 76 Cal. App. 2d 772, 781, 174 Pac. 2d 34;
People v. Mayen (1922), 188 Cal. 237, 251, 205 Pac. 435, 441;
Ryan v. Crist (1914), 23 Cal. App. 744, 744-745, 139 Pac. 436.

Such property may be recovered when held by the police and prosecuting authorities

Atlas Finance Corp. v. Kenny (1945), 68 Cal. App. 2d 504, 157 Pac. 2d 401;
Silva v. MacAuley (1933), 135 Cal. App. 249, 253, 26 Pac. 2d 887, 27 Pac. 2d 791; and
Dictum in *Gardiner v. Frederickson* (1925), 70 Cal. App. 677, 679, 234 Pac. 117, 118;

and even judicial officers are properly reached in California by mandate.

Stern v. Superior Court (1946), 76 Cal. App. 2d 772, 780-784, 174 Pac. 2d 34.

In addition, criminal prosecution of a public officer may be had under criminal statutes which cover misuse of process by a public officer (Penal Code, Sec. 146),[3] mali-

[3]Cal. Penal Code, Sec. 146, provides:
"Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, or seizes or levies upon any property, or dispossesses anyone of any lands or tenements, without a regular process or other lawful authority therefor, is guilty of a misdemeanor."

cious procurement of a search warrant or warrant of arrest without probable cause (Penal Code, Sec. 170),[4] and false imprisonment (Penal Code, Sec. 236).[5]

Also a civil suit for damages will lie in California to redress an illegal search and seizure. For successful recoveries see: *Noack v. Zellerbach* (1936), 11 Cal. App. 2d 186, 53 Pac. 2d 986 (rehearing denied by District Court of Appeal February 8, 1936, hearing denied by California Supreme Court March 9, 1936); *Silva v. MacAuley,* 135 Cal. App. 249, 26 Pac. 2d 887 (rehearing denied by District Court of Appeal December 8, 1933, and hearing denied by California Supreme Court January 4, 1934, two justices dissenting).

White v. Towers (Sept. 4, 1951), 37 A. C. 734, cited in petitioner's opening brief at page 11, has no application to the instant case. *White v. Towers, supra,* did not involve any search or seizure nor any false arrest. Rather, it was a suit for malicious prosecution against a State Fish and Game Commission investigator based on his having filed two criminal complaints against the plaintiff, one in the state court for having deposited petroleum matter deleterious to fish and plant life in State waters, and the second in the Federal court charging the

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[4]Cal. Penal Code, Sec. 170, provides:

"Every person who maliciously and without probable cause procures a search-warrant or warrant of arrest to be issued and executed, is guilty of a misdemeanor."

[5]Cal. Penal Code, Sec. 236, provides:

"False imprisonment is the unlawful violation of the personal liberty of another."

plaintiff with the pollution of navigable waters. It was not alleged that the defendant had acted without the scope of his authority. Thereafter, the California court held that the defendant in his official capacity as investigator for the State Fish and Game Commission was immune from civil liability for the alleged malicious prosecution of the said criminal proceedings. However, the court pointed out that the offended individual had a remedy under the penal statutes in that such an officer might be guilty of a misdemeanor under Penal Code, Section 170, if he "maliciously and without probable cause procures a search-warrant or warrant of arrest to be issued and executed." Further, the court reiterated that a public officer is liable for injury caused by acts done outside the scope of his authority.

5. Local Public Opinion as Deterrent.

An additional deterrent in the form of local public opinion is set forth in the following language from *Wolf v. Colorado* (1949), 338 U. S. 25, 69 S. Ct. 1359, 1364, 93 L. Ed. 1782:

> ". . . There are, moreover, reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under State or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of the police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country."

6. THE FEDERAL RULE OF EXCLUSION IS ONE OF JUDICIAL POLICY RATHER THAN A CONSTITUTIONAL DEMAND. THE STATES ARE FREE TO ADOPT THEIR OWN RULES OF EVIDENCE.

In *Wolf v. Colorado* (1949), 338 U. S. 25, 69 S. Ct. 1359, 1361, 1367, 93 L. Ed. 1782, the Federal exclusionary rule was characterized as "a matter of judicial implication" and as "a judicially created rule of evidence" which Congress might negate. Specifically, the court said (69 S. Ct. 1359, 1362-1363):

> ". . . Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. . . ."

The Constitution of the United States does not prohibit a state from establishing its own rules of evidence, for it is within the established power of the state to prescribe the evidence which is to be received in the courts of its own government.

Adams v. New York (1903), 192 U. S. 585, 599, 24 S. Ct. 372, 48 L. Ed. 575;

Logan & Bryan v. Postal Telegraph & Cable Co., 157 Fed. 570, 578 (E. D. Ark. 1908).

As is stated in *Lisenba v. California* (1941), 314 U. S. 219, 62 S. Ct. 280, 286, 86 L. Ed. 166:

> ". . . The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law."

Moreover, the state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.

Brown v. New Jersey (1899), 175 U. S. 172, 175, 20 S. Ct. 77, 44 L. Ed. 119.

Due process of law is process according to the law of the land. This process in the state is regulated by the law of the state.

Holden v. Hardy (1898), 169 U. S. 366, 385, 18 S. Ct. 383, 385, 42 L. Ed. 780;

Hallinger v. Davis (1892), 146 U. S. 314, 320, 13 S. Ct. 105, 36 L. Ed. 986.

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefits of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line.

Holden v. Hardy (1898), 169 U. S. 366, 18 S. Ct. 383, 386, 42 L. Ed. 780;

Hurtado v. California (1884), 110 U. S. 516, 4 S. Ct. 111, 121, 28 L. Ed. 232.

The due process clause of the Fourteenth Amendment does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed

not to have been due process of law the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend.

Twining v. New Jersey (1908), 211 U. S. 78, 112, 29 S. Ct. 14, 25, 53 L. Ed. 97.

A state is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. The state's procedure does not run foul of the Fourteenth Amendment to the United States Constitution because another method may be thought fairer or wiser or give a surer measure of protection to the prisoner at the bar.

Snyder v. Commonwealth of Mass. (1934), 291 U. S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674.

See, also:

Brown v. New Jersey (1894), 175 U. S. 172, 175, 20 S. Ct. 77, 44 L. Ed. 119.

Again, in *Hurtado v. California* (1884), 110 U. S. 516, 537, 4 S. Ct. 111, 28 L. Ed. 232:

". . . 'It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.'"

7. THE FEDERAL EXCLUSIONARY RULE ADMITS IN FEDERAL COURT EVIDENCE OBTAINED ILLEGALLY BY STATE AUTHORITIES.

The Federal exclusionary rule renders inadmissible in Federal prosecutions evidence which federal officers have obtained by unreasonable search and seizure in violation of the Fourth Amendment to the Federal Constitution.

Weeks v. United States (1913), 232 U. S. 383, 398, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1015B 834, Ann. Cas. 1915C, 1177;

Gouled v. United States (1921), 255 U. S. 298, 41 S. Ct. 261, 263-264, 65 L. Ed. 647;

Feldman v. United States (1944), 322 U. S. 487, 64 S. Ct. 1082, 1084, 88 L. Ed. 1408, 154 L. Ed. 982.

However, evidence obtained by wrongful seizure by state officers without Federal participation are not prohibited by the Fourth Amendment from use in the Federal courts:

Silverthorne Lumber Co. v. United States (1920), 251 U. S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319;

Byars v. United States (1927), 273 U. S. 28, 47 S. Ct. 248, 250, 71 L. Ed. 520;

United States v. Rabgen, 173 Fed. 2d 668, 670 (C. C. A. 7th, 1949);

Shelton v. United States (1948), 169 Fed. 2d 665, 668, 83 U. S. App. D. C. 257, certiorari denied 335 U. S. 834, 69 S. Ct. 24, 93 L. Ed. 387.

Nor does the wrongful seizure of a defendant's property by private parties bar its use as evidence in a Federal Court:

Burdeau v. McDowell (1921), 256 U. S. 465, 41 S. Ct. 574, 576, 65 L. Ed. 1048, 13 A. L. R. 1057.

Amongst the cases holding admissible in a Federal proceeding, evidence obtained by state authorities operating entirely on their own account by means of unreasonable search and seizure, which evidence subsequently is transmitted to Federal authorities, are the following:

Gilbert v. United States, 163 Fed. 2d 325, 327 (10th Cir. 1947);

Wheatley v. United States, 159 Fed. 2d 599, 601 (4th Cir. 1946);

Lotto v. United States, 157 Fed. 2d 623, 625 (8th Cir. 1946);

Ruhl v. United States, 148 Fed. 2d 173, 174 (10th Cir. 1945);

Balman v. United States, 94 Fed. 2d 197, 198 (8th Cir. 1938);

In re Mayburne, 77 Fed. 2d 310, 311 (2d Cir. 1935).

However, evidence will not be admitted in a Federal court where the United States Government agents instigate the search and seizure by state agents (*United States v. De Bousi*, 32 Fed. 2d 902, 903 (D. Mass. 1929); where there is a prior understanding as to the use of evi-

dence between law enforcement bodies of the two governmental units;

Gilbert v. United States, 163 Fed. 2d 325, 327 (10th Cir. 1947);

Lowrey v. United States, 128 Fed. 2d 477, 478-480 (8th Cir. 1942);

Fowler v. United States, 62 Fed. 2d 656, 656-657 (7th Cir. 1932);

United States v. Falloco, 277 Fed. 75, 82 (W. D. Mo. 1922);

or where the sole purpose of state officers is to aid in enforcement of the Federal law.

Gambino v. United States (1927), 275 U. S. 310, 48 S. Ct. 137, 138-139, 72 L. Ed. 293, 52 A. L. R. 1381;

Butler v. United States, 156 Fed. 2d 897, 898 (10th Cir. 1946).

Further in a Federal Court evidence obtained by illegal search and seizure may be admitted unless a timely motion to suppress is made in advance of trial. A motion to suppress made at the trial comes too late where the defendant had knowledge of the seizure prior to trial but neglected to make such a motion before the trial.

Segurola v. United States (1927), 275 U. S. 106, 48 S. Ct. 77, 79, 72 L. Ed. 186, and cases cited therein;

Rocchia v. United States, 78 Fed. 2d 966, 970 (C. C. A. 9th, 1935);

Smith v. United States (1940), 112 Fed. 2d 217, 218, 72 App. D. C. 187, certiorari denied in 311 U. S. 663, 61 S. Ct. 20, 85 L. Ed. 425.

The instant case involves a prosecution in a state court after a search and seizure by state officers without any federal participation whatsoever. If it is concluded herein that the instant search and seizure by state officers alone renders the evidence so obtained inadmissible in state courts, such conclusion would be inexplainable in the light of, and hopelessly in conflict with the present unquestioned decisions of the United States Supreme Court recognizing that evidence unlawfully obtained by state officers without federal participation or collaboration would be admissible in a prosecution in the Federal Courts.

It is submitted that if the federal exclusionary rule is thrust upon the states then the federal exceptions and formalities also would become applicable to the states. Here the defendant had knowledge of the search and seizure long before the trial, indeed from the moment of its occurrence, yet he made no motion to suppress prior to trial. Clearly, in a prosecution in the Federal Court any attempt to suppress evidence at the trial would have been unavailing because in the Federal Courts evidence obtained by unreasonable search and seizure is admissible in the absence of a timely motion to suppress.

IV.

The Instant Record Does Not Reveal Any Unreasonable or Unlawful Search and Seizure.

In the opinion of the California District Court of Appeal (*People v. Rochin,* 101 Cal. App. 2d 140, 225 Pac. 2d 1) it was stated that the three deputy sheriffs were not authorized by search warrant or at all to enter appellant's bedroom. [R. 181.] However, the instant record reveals a total lack of evidence to establish the absence of a search warrant herein. Actually, the record in the case at bar is silent on the subject of a search warrant so that it is impossible to ascertain therefrom whether a search warrant was or was not possessed by the arresting officers.

When called as a witness for the prosecution, Deputy Sheriff Jones, regarding the officers' entry into Mr. Rochin's room, on direct examination testified as follows:

"Q. Mr. Jones, what is your business or occupation? A. Deputy sheriff, assigned to the Sheriff's narcotic detail.

Q. Was that your occupation on the 1st of July, 1949? A. Yes, it was.

Q. I direct your attention to the defendant. Did you see him that day? A. Yes, I saw him on that day.

Q. About what time was it when you first saw him? A. It was approximately 9:00 o'clock a. m.

Q. In the morning? A. In the morning.

Q. Where was that? A. It was at a residence at 1700 East 69th Street.

Q. In this county? A. In the County of Los Angeles.

Q. What was it that directed your attention to the defendant? A. I had some information that he was selling narcotics.

Mr. Marcus: I move that be stricken.

Mr. Carr: That may go out.

Mr. Marcus: Just a moment.

Mr. Carr: That may go out.

[fol. 21] Mr. Marcus: I move that be stricken and the witness instructed, your Honor.

The Court: That goes out, and the one juror is instructed also.

By Mr. Carr:

Q. Now, did you go to that residence? A. Yes, I did.

Q. Did you go alone or did someone go with you? A. I was in company with Deputy Shelton and Deputy Smith.

Q. Are they also deputy sheriffs of this county? A. Yes, they are.

Q. And they worked with you? A. Yes.

Q. What type of a premise is it? I mean, is it a residence or a store building or a meat market or what? A. It is a residence, two-story residence.

Q. When you went in there, did you go to any part of that residence? A. Yes, I went upstairs.

Q. Some particular room? A. I went up a stairway and I encountered the kitchen. I then turned to the left and went through a door, and that is when I saw the defendant.

Q. What were the furnishings of that room? A. There was a bed and a dresser and also a little night stand next to the bed.

[fol. 22] Q. Was there anyone in the room other than the defendant? A. Yes, there was a woman who gave her name as Hernandez." [R. 7-9.]

Thereafter, counsel for appellant indulged in the following cross-examination of Deputy Jones:

"Cross-Examination.

By Mr. Marcus:

Q. This was a dwelling house that yon entered, was it? A. Yes.

Q. Together with two officers? A. Yes.

[fol. 44] Q. Did you see any people as you entered the dwelling? A. No, I did not.

Mr. Marcus: Mrs. Rochin, stand up, please.

(Mrs. Rochin stands.)

By Mr. Marcus:

Q. Did you see this lady (indicating)? A. I saw her as we left the dwelling. However, I did not see her going up.

Q. Did you see anybody else in the residence at the time? A. Yes. There was a small boy.

Mr. Marcus: You may sit down, Mrs. Rochin.

By Mr. Marcus:

Q. Did you ask this lady her name? A. No, I did not.

Q. Did you ask the little boy's name? A. He stated that he was the brother of Antonio Rochin. I didn't ask him.

Q. Were there any other people in the house at the time that you entered? A. That is all I recall, sir.

Q. Did you determine who the lady was during your stay there? A. Antonio Rochin stated that it was his mother.

Q. That was in some conversation that you had with him? A. Yes.

Q. You immediately went upstairs, did you? A. Yes.

[fol. 45] Q. How did you get into the house? A. The door to the stairway was open.

Q. Well, you broke the door open, did you not? A. No.

Q. Did you force the door open? A. Not the downstairs door. There was a door to Rochin's room that had a small lock on it.

Q. Did you force that open? A. Yes.

Q. You say 'Rochin's room.' You mean the room that Rochin occupied? A. Well, the room that Rochin occupied, yes." [R. 24-25.]

Significantly, at no time during the trial did counsel for the appellant inquire if the officers had a search warrant or a warrant of arrest, nor had any such question been asked on direct examination. Consequently, the record is silent on such points. Without evidence in the record establishing the non-existence of a search warrant, an appellate court cannot presume that a search warrant was lacking herein. Indeed, in California, the Code of Civil Procedure sets up a rebuttable presumption that official duty has been regularly performed;[6] which presumption never has been rebutted in the instant case.

Nor is an unlawful entry established by the Officer Jones' testimony on cross-examination, that the door to Mr. Rochin's bedroom had been forced open, which door

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[6] California Code of Civil Procedure, Section 1963(15), provides:

"All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: . . .

15. That official duty has been regularly performed."

had a small hook on it. [R. 25.] The California Penal Code, Section 1531, pertaining to search warrants, recites:

> "The officer may break open any outer or inner door or window of a house, or any part of a house or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance."

In the instant case, although Jones had been asked if the bedroom door had been forced [R. 25] the witness was never asked if the officers, or any of them, immediately prior to such forcing, had given or attempted to give any notice of authority and purpose, or had requested or had been refused admittance. Consequently, the transcript of the proceedings in the trial court not only fails to establish a lack of a search warrant but any improper execution thereof.

It often has been held that an appellate court will not and cannot consider matters not appearing in the record, and the burden is on the party alleging error to show it affirmatively by the record, and in the absence of such showing error will not be presumed.

People v. O'Neill (1947), 78 Cal. App. 2d 888, 892, 179 Pac. 2d 10, 12;

El Rio Oils v. Pacific Coast Asphalt Co. (1949), 95 Cal. App. 2d 186, 190, 213 Pac. 2d 1 (1949), rehearing denied January 9, 1950. Hearing denied by California Supreme Court February 16, 1950;

Cutts v. Tinning (1947), 81 Cal. App. 2d 423, 431, 184 Pac. 2d 171, 176, petition for rehearing denied October 6, 1947;

People v. Holmes (1897), 118 Cal. 444, 449; 50 Pac. 675;

People v. Russell (1909), 156 Cal. 450, 458, 105 Pac. 416;

Wiggins v. Burkham (1869), 10 Wall. 129, 77 U. S. 129, 19 L. Ed. 884;

Collins v. Riley (1881), 104 U. S. 322, 328, 26 L. Ed. 752.

Stated otherwise, the existence of facts upon which the record is silent will not be presumed for purposes of reversal, rather on appeal every presumption is in favor of the validity of the judgment.

Boley v. Griswald (1874), 20 Wall. 486, 488, 87 U. S. 486, 488, 22 L. Ed. 375;

Collins v. Riley (1881), 104 U. S. 322, 328, 26 L. Ed. 752;

Settlemier v. Sullivan (1878), 97 U. S. 444, 449, 24 L. Ed. 1110;

Morgan v. Sun Oil Co., 109 Fed. 2d 178, 181 (C. C. A. 5th Tex. 1940), certiorari denied 310 U. S. 640, 60 S. Ct. 1086, 84 L. Ed. 1408.

Further, the burden of proving that evidence sought to be introduced has been unlawfully obtained rests upon the party objecting to it.

Nardone v. United States (1939), 308 U. S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307;

United States v. Pillon, 36 Fed. Supp. 567 (D. C. E. D. N. Y., 1941);

United States v. Daniels (1950), 10 F. R. D. 225, 228;

Thus, in *Schnitzer v. United States*, 77 Fed. 2d 233, 235 (C. C. A. 8th W. D. Ark. 1935), the court in holding

that defendant had not met the burden imposed on him said:

> ". . . While courts should be alert to prevent encroachments upon constitutional guarantees, the right to such protection is a matter of proof with the burden upon the one alleging such protection. Here the parties were given full opportunity to develop the facts and situation to which the amendment was to be applied. . . ."

The question as to lack of a search warrant cannot be raised for the first time on appeal.

Landsborough v. United States, 168 Fed. 2d 486, 488 (C. C. A. 6th, 1948).

Again, in *Jarabo v. United States,* 158 Fed. 2d 509, 513 (C. C. A. 1st, 1946), the appellant at the trial had objected to the admission of photographs on the ground that the government had not shown that its agents took them from his apartment pursuant to a legal search warrant. Although stating that this ground had not been pressed on appeal, the court held that such argument was untenable for the reason that the burden of proving that evidence has been unlawfully obtained rests upon the party objecting to it.

In concluding this point of the argument, respondent frankly asserts that it is not urging that the arresting officers in fact possessed a search warrant. Rather, respondent is pointing out and is urging that the record in this case is fatally deficient in that it does not reveal whether or not the officers did or did not possess a search warrant, and that, therefore, the appellant failed to meet the burden imposed upon him by law, namely, showing affirmatively by the record an unlawful search and seizure.

V.

The Record Herein Discloses That the Arrest of the Appellant Was Lawful and the Ensuing Search and Seizure of Contraband Was Permissible.

Respondent reiterates that the instant record does not disclose the absence of either a search warrant or warrant of arrest. However, assuming that no warrant of arrest was present, the record does contain sufficient facts to establish a valid non-warrant arrest of Mr. Rochin under California law.

It has been held that the law of the state in which an arrest without a warrant is made determines its validity.

United States v. Di Re (1948), 332 U. S. 581, 68 S. Ct. 222, 226-227, 92 L. Ed. 210;

Johnson v. United States (1948), 333 U. S. 10, 68 S. Ct. 367, 370, 92 L. Ed. 436.

In California Penal Code, Section 836 reads as follows:

> "A peace-officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
>
> 1. For a public offense committed or attempted in his presence.
>
> 2. When a person arrested has committed a felony, although not in his presence.
>
> 3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.
>
> 4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
>
> 5. At night, when there is reasonable cause to believe that he has committed a felony."

Assuming the lack of a warrant of arrest in the instant case, respondent nevertheless maintains that the appellant's arrest herein was a lawful arrest pursuant to California Penal Code Sections 836(1) and (2). Indeed, the record conclusively establishes that the appellant had in fact committed the felony denounced by Section 11500 of the California Health and Safety Code.[7] Further, the possession of the prohibited narcotic being a continuing offense, appellant in his room then and there was committing a public offense in the presence of the arresting officers. Thus, in the instant case, as in *Marron v. United States* (1927), 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231, the items seized were visible and accessible and were in the offender's immediate custody. Thereafter, not only did the appellant physically resist arrest but he also did attempt to conceal and destroy evidence in their presence in violation of California Penal Code Section 135[8] on unlawful destruction of evidence.

Moreover, the arresting officers at the trial, because of an objection interposed in behalf of appellant, were precluded from establishing the "reasonable cause" essential

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[7]California Health and Safety Code, Section 11500, declares:

"Except as otherwise provided in this division, no person shall possess, transport, sell, furnish, administer or give away, or offer to transport, sell, furnish, administer, or give away, or attempt to transport a narcotic except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State."

[8]California Penal Code, Section 135, reads:

"Every person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, willfully destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor."

to a non-warrant felony arrest within the meaning of California Penal Code Section 836, subdivisions 3 and 4.

Significantly, Deputy Sheriff Jones attempted to show that the officers had not arbitrarily entered the premises at 1700 East 69th Street in Los Angeles, but that they had reasonable cause for believing that a felony had been committed, or was being committed therein, and that appellant was the person who had committed or was committing such felony. Indeed the following question had been asked of Officer Jones and the following answer elicited from him:

> "Q. What was it that directed your attention to the defendant? A. I had some information that he was selling narcotics." [Rep. Tr. p. 3, lines 19-22.]

However, upon objection of appellant's counsel, the trial court ordered such evidence stricken from the record. [Rep. Tr. p. 4.] Undoubtedly, the trial judge refused to allow any explanation as to why the officers entered the premises in question because in a criminal case under the existing law how they had entered was immaterial, for evidence even improperly obtained was nonetheless admissible. Now this defendant is in the novel position of questioning the lawfulness of his arrest when it is clear from the record that it was his own intervention which prevented the prosecution from eliciting from the arresting officers facts and circumstances which would have established a lawful arrest. Where, as here, the defendant forestalls inquiry relative to the reasonable or probable cause for the officers' belief that a felony had been or was being committed on the premises herein involved, such defendant cannot later be permitted to assert that no reasonable or probable cause existed.

The usual rule is that a police officer may arrest without a warrant one believed by the officer upon reasonable or probable cause to have been guilty of a felony.

Carroll v. United States (1925), 267 U. S. 132, 45 S. Ct. 280, 286, 69 L. Ed. 543.

Probable cause has been defined as nothing more than reasonable grounds for belief, based upon facts and circumstances known to the officers that an offense has been committed or was being committed on the premises.

United States v. Daniels, 10 F. R. D. 225, 227 (D. N. J. 1950);

Papani v. United States, 84 Fed. 2d 160, 163 (C. C. A. 9th, 1936).

"The probable cause, which must exist to enable an officer to arrest for the commission of past felonies, is defined in Stacey v. Emery, 97 U. S. 642, 645, 24 L. Ed. 1035, as follows:

"'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient.'"

Papani v. United States, 84 Fed. 2d 160, 163 (C. C. A. 9th, 1936).

As stated in *Brinegar v. United States* (1949), 338 U. S. 160, 69 S. Ct. 1302, 1310-1311, 93 L. Ed. 1789:

"'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' McCarthy v. De Armit, 99 Pa. 63, 69, quoted with approval in the Carroll opinion, 267 U. S. at page 161, 45 S. Ct. at page 288, 69 L. Ed. 543; 39 A. L. R. 790. And this 'means less than evidence which would justify condemnation' or conviction, as Mar-

shall, C. J., said for the Court more than a century ago in Locke v. United States, 7 Cranch 339, 348, 3 L. Ed. 364. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U. S. 132, 162, 45 S. Ct. 280, 288, 69 L. Ed. 543, 39 A. L. R. 790."

(Rehearing denied 338 U. S. 839, 70 S. Ct. 31, 94 L. Ed. 513.)

Where there is a lawful arrest it has been held that a reasonable search and seizure is valid where incident to such lawful arrest.

Marron v. United States (1927), 275 U. S. 192, 198-199, 48 S. Ct. 74, 77, 72 L. Ed. 231;

United States v. Di Re (1948), 332 U. S. 581, 68 S. Ct. 222, 225, 92 L. Ed. 210;

Carroll v. United States (1925), 267 U. S. 132, 158, 45 S. Ct. 280, 287, 69 L. Ed. 543, 39 A. L. R. 790;

Vecchio v. United States, 53 Fed. 2d 628, 631 (8th C. C. A. Neb. 1931).

A search incident to a valid arrest must be made at the place of arrest and contemporaneously with it.

United States v. Coffman, 50 Fed. Supp. 823, 825 (D. C. S. D. Cal. 1943);

Papani v. United States, 84 Fed. 2d 160, 163 (9th C. C. A. 1936).

Whether a search and seizure is reasonable depends on the facts and circumstances of each case.

United States v. Rabinowitz (1950), 339 U. S. 56, 70 S. Ct. 430, 434, 94 L. Ed. 653;

Go-Bart v. United States (1931), 282 U. S. 344, 357, 51 S. Ct. 153, 158, 75 L. Ed. 374;

United States v. Costner, 153 Fed. 2d 23, 26 (6th C. C. A. Tenn. 1946);

Rocchia v. United States, 78 Fed. 2d 966, 969 (9th C. C. A. Cal. 1935).

The test is not whether it is reasonable or practicable to procure a search warrant but rather whether the search was reasonable under all the circumstances of the case.

United States v. Rabinowitz (1950), 339 U. S. 56, 70 S. Ct. 430, 435, 94 L. Ed. 653.

A general exploratory search has been held to be unreasonable.

United States v. Lefkowitz (1932), 285 U. S. 452, 52 S. Ct. 420, 423, 76 L. Ed. 877.

In *Harris v. United States* (1947), 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399, federal agents without a search warrant but with a warrant of arrest issued, upon an information charging check forgeries arrested defendant in his four-room apartment. After a five-hour search of the premises, wherein the officers looked for cancelled checks, and in a room other than that in which appellant was arrested, the officers seized a sealed envelope containing draft cards and registration certificates, which evidence was used in the federal court to convict appellant of violation of the Selective Service Training Act. Although it was conceded that the evidence seized was

in no way related to the crime for which defendant originally was arrested and that the search which led to its discovery was not conducted under the authority of a search warrant, the court held that such evidence had been taken as an incident to arrest, in making, which the agents had a right to make, a reasonable search of the premises, and that the search so made was reasonable. Moreover, the court pointed out that in keeping draft cards in his custody the defendant had been guilty of a serious and continuing offense against the laws of the United States so that a crime was thus being committed in the very presence of the agents conducting the search.[9]

In *Donahue v. United States*, 56 Fed. 2d 94, 97 (C. C. A. 9th 1932), where state officers and two federal agents had seized a still inside a dwelling house, the court held that a search and seizure without any warrant was justified. The agents on the day before had received information that Donahue intended to make a run of liquor at his ranch. On the day following the receipt of the information they approached to within a couple of hundred feet of the house where they could smell the odor of liquor and heard what they believed to be a still in operation. Thereafter, the court concluded:

> ". . . If the information which had reached the officers prior to the arrest and search, that is, prior to the opening of the door of the dwelling house, and

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[9]In *Harris v. United States* (1947), 331 U. S. 145, 67 S. Ct. 1098, 1102, 91 L. Ed. 1399, rehearing denied 331 U. S. 867, 67 S. Ct. 1527, the majority opinon does point out that this is not a case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime.

the knowledge they had gained through their senses of smell and hearing, was sufficient to give them probable cause to believe that a felony was being committed in their presence, they were entitled to enter the dwelling and make the arrest (citing cases) . . . . That they had reasonable cause to believe that a felony was being committed in their presence is clear, and they therefore had a right to enter the premises for the purpose of making an arrest, and, as an incident thereto, to seize property found in appellant's control, which it was unlawful for him to have. (Citing cases.)"

In the *Donahue* case, 56 Fed. 2d 94, 97 (C. C. A. 9th 1932), the federal agents the day prior to going out to Donahue's ranch had information about a run of liquor scheduled for the next day. Nevertheless, they proceeded to the dwelling on such following day without any type warrant and proceeded to make a lawful arrest because the court found that the officers had reasonable or probable cause to believe that a felony was being committed in their presence. However, in the instant case, although the arresting officers had information that Mr. Rochin was selling narcotics [R. 8], the defendant's counsel by interposing an objection [R. 8] precluded the officers from revealing the circumstances which they believed to have established reasonable or probable cause that a felony had been or then was being committed in the residence entered by them. Moreover, respondent sincerely believes that it would seem to be far more reasonable to insist upon a search warrant when the property expected to be

seized is a still, as contrasted with capsules of narcotics, which contraband easily can be disposed of down the nearest available drainpipe or toilet bowl.

Further, the case of *Johnson v. United States* (1948), 333 U. S. 10, 68 S. Ct. 367, 369, 92 L. Ed. 436, recognized that there are exceptional circumstances in which balancing the need for effective law enforcement against the right of privacy, a warrant for search of a home may be dispensed with. As an illustration thereof the court mentioned "contraband threatened with removal or destruction." In the instant case the officers had information that the defendant was selling narcotics. [R. 3.] Taking into consideration the nature of the contraband narcotic herein recovered and its propensities for harm, together with the possibility that before a warrant could be obtained such contraband could be disposed of by sale to outsiders or by use by the occupants, or disposed of down the drainpipe at the first announcement that officers with a warrant desired admittance, respondent believes that the instant case falls within the exceptional circumstances of the *Johnson* case.

Although, in the federal courts the victim of an illegal search may suppress as evidence contraband seized in the course of such search (*Lustig v. United States* (1949), 338 U. S. 74, 69 S. Ct. 1372, 93 L. Ed. 1819), it also is well recognized that an officer who lawfully has come upon property which is contraband, that is property the possession of which is illegal, may seize it without a search warrant. (*Harris v. United States* (1947), 331 U. S. 145, 67 S. Ct. 1098, 1103, 1117, 91 L. Ed. 1399; *Boyd v. United States* (1886), 116 U. S. 616, 624, 6 S. Ct. 524, 528, 29 L. Ed. 746.)

VI.

The Evidence Obtained by Stomach Pumping Was Admissible Herein Over Any Objection Grounded on Illegal Search and Seizure.

Even where the strict federal rule on search and seizure is followed, the rule is that evidence obtained from a person under legal arrest is admissible over an objection grounded on illegal search and seizure.

Ladd and Gibson, "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," 24 Iowa Law Review, 191, 216;

Novak v. District of Columbia, 49 Atl. 2d 88, 91 (Mun. Ct. D. C. 1946) (involving analysis of urine specimen) reversed on other grounds in 160 Fed. 2d 588 (1947);

Dictum in *State v. Cram* (1945), 176 Ore. 577, 160 Pac. 2d 283, 289, 1945, and dictum in *State v. Weltha* (1940), 228 Iowa 519, 292 N. W. 148, 149, and cases therein cited (both cases involving blood test on unconscious man);

Bratcher v. United States, 149 Fed. 2d 742, 745-746 (C. C. A. 4th Va. 1945), where physical examination of draftee who took benzedrine to raise blood pressure to avoid army induction was held not to be unlawful search and seizure.

But in the majority of states which do not follow the federal rule,[10] it is held that unlawful search and seizure

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[10]Bachelder, Use of Stomach Pump as Unreasonable Search and Seizure, July-August, 1950 Issue, 41 J. Crim. L. & Criminology, pp. 189, 192, declares:

"11. 19 states, follow federal rule of excluding illegally seized evidence: Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West

does not make inadmissible any evidence so found if such evidence is material to the issues. Thus, in *State v. Sturtevant* (1950), 96 N. H. 99, 70 Atl. 2d 909, 913, the court in affirming a conviction for reckless operation of a motor vehicle resulting in the death of a person where the admissibility of results of a chemical test of defendant's blood was in issue, said:

> "Cases such as State v. Weltha, 228 Iowa 519, 292 N. W. 148, where comparable evidence was held inadmissible because of constitutional provisions against unreasonable search and seizure, must be distinguished. In the case before us no objection was made to the evidence upon the ground there held to be controlling. But it may be noted that the view entertained in the Weltha case does not prevail here. Such a defense depends upon provisions of the Fourth Amendment to the Federal Constitution. The Federal rule, by which evidence secured through an illegal search and seizure is excluded, Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, is not binding upon the states. Wolf v. Colorado, 338 U. S. 25, 69 S. Ct. 1359. The doctrine of the Weeks case has not been adopted here, either before its announcement, State v. Flynn, 36 N. H. 64; see, Boynton v. Trumbull, 45 N. H. 408, 410

Virginia, Wisconsin, and Wyoming. 26 states reject it: Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, South Carolina, Utah, Vermont, and Virginia."

However, since then at least one state formerly with the majority has joined the minority (*Rickards v. State*, Del. 1950, 77 Atl. 2d 199, 205). See also: Tables in *Wolf v. Colorado* (1949), 338 U. S. 25, 69 S. Ct. 1359, 1364-1367, 93 L. Ed. 1782.

or since. State v. Agalos, 79 N. H. 241, 107 A. 314. In this respect New Hampshire is said to be in company with twenty-nine other states. Wolf v. Colorado, *supra*, 338 U. S. 25, 69 S. Ct. at page 1362. Moreover, the facts of this case would not invite reconsideration of the rule of State v. Agalos. The exceptions to the receipt of the evidence of the blood analysis are overruled" (p. 912).

See, also:

People v. One 1941 Mercury Sedan (1946), 74 Cal. App. 2d 199, 202-203, 168 Pac. 2d 443, involving stomach pumping to recover marihuana, emphasized that where competent evidence is introduced, the courts will not permit inquiry into its source or the means by which it was obtained;

Taylor v. State (1950), 213 Pac. 2d 588, 591, 594 (Okla. Cr. App.), sustaining conviction of man who had been given castor oil after X-ray showed him to be harboring stolen jewelry;

Ash v. State (1940), 139 Tex. Cr. App. 420, 141 S. W. 2d 341, 345, permitted police to give enema to man who swallowed stolen rings as he was arrested. This, although Texas excludes illegally seized evidence.

Thus, in the case of *In re Guzzardi*, 84 Fed. Supp. 294 (U. S. D. C., N. D., Texas, 1949), the petitioner alleged that he had been mistreated and manhandled and his stomach pumped over his protest, as a result of which heroin was obtained and used as evidence to convict him in the Federal Court. Sustaining the conviction, the court held that the Fourth Amendment which provides that the right of the people to be secure in their persons

against unreasonable searches and seizures shall not be violated, applies only to the national government and its agents, and that any evidence secured through unlawful search and seizure by state officers not acting directly, or indirectly, in behalf of the United States is admissible in a prosecution in the Federal Courts. Thereafter, the court held that the evidence showed consent to the stomach pumping, that the use of such stomach pump and emetic by state officers to recover contraband heroin, which subsequently was used to convict the defendant in the Federal Court, did not entitle him to release on habeas corpus on the ground that his rights under the Fourth Amendment to the Federal Constitution were violated.[11]

Conclusion.

The respondent herein, the People of the State of California, urges that this Court reaffirm its prior holdings, namely, that in a prosecution in a state court for a state offense, the due process clause of the Fourteenth Amendment does not require the exclusion of evidence obtained by state officers by unreasonable search and seizure. Such requested conclusion is the only one consistent with the common law and judicial precedent in this country. Whereas the Federal Government has adopted the rule of exclusion for its own tribunals, this Court has character-

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[11]But see *United States v. Willis*, 85 Fed. Supp. 745 (U. S. D. C., S. D. Cal., Cent. Div., 1949), where a Federal agent had participated in arrest and stomach pumping, where it was undisputed that the officers had neither search warrant nor warrant of arrest, and where defendant never made any admissions but made a timely motion to suppress as evidence the heroin secured from his stomach, the court held such evidence inadmissible. On page 748 of its opinion the court stated that it was not called upon to decide whether the evidence would have been acceptable if the Federal agent had not participated until after the acquisition of the narcotics.

ized such doctrine as one of judicial policy rather than as a constitutional demand. Similarly, the respondent requests that this Court continue to recognize the right of the state to formulate its own policy for its own courts based on its own experience, and the right of such state after balancing the opposing interests represented by the necessity for individual protection plus the possibility of other redress for the violation of such individual right against the social need that crime must be repressed, to adopt either the admissibility rule or the exclusionary rule as it deems best for the interests of all of its people.

A careful examination of the record in this case will, we submit, afford conviction that the defendant had a full, fair and impartial trial, totally unaffected by the propriety of the officers in obtaining the evidence presented at such trial. However, the respondent does reiterate that the instant record fails to disclose either an unreasonable search and seizure or an unlawful arrest of the defendant. Hence respondent requests that the judgment herein be affirmed.

Respectfully submitted,

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